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No. ~~2116~~

In the

United States Court of Appeals

For the Ninth Circuit

WALTER SELINGER,

Appellant,

vs.

LESTER BIGLER, Special Agent of the Internal Revenue Service, and ROBERT LANDESMAN, Internal Revenue Agent,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona

Reply Brief for Appellant

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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ARGUMENT

I. The Inspection and Photocopying of the Taxpayer's Books and Records Violated the Taxpayer's Constitutional Rights Because He Was Not Informed of His Right to Counsel.

Mr. Bigler admitted in his deposition that he did not advise Mr. Selinger that he had the right to counsel and the evidence is clear that he did not inform the taxpayer of the criminal nature of the investigation. (Bigler Deposition, Page 10) Since the taxpayer was not so informed of this right, and did not have advice of counsel, he did not intelligently waive his rights under the Fourth Amend-

ment when he allegedly consented to having the Revenue Agents examine his books and records.

If the rationale of *Miranda v. Arizona,* 384 U.S. 436 (1966) is to have any meaning at all in a tax fraud investigation, the taxpayer must be informed of his right to counsel whenever a Special Agent of the Internal Revenue Service enters the case. The critical time for the advice of an attorney is when a Special Agent interrogates a taxpayer and seeks permission to examine his books and records. (Br. 12) This is when the taxpayer most needs to be informed of the consequences of allowing a Special Agent to inspect and photocopy his records. After the books and records of a taxpayer have been examined by specially trained Revenue Agents, the evidence needed to convict the taxpayer will normally have been obtained. To inform the taxpayer of his right to counsel at some later time would be a useless gesture.

The crucial difference between a criminal tax investigation and other criminal investigations is that whenever a criminal tax investigation begins, there is always a suspect. On the other hand, in a normal criminal investigation, the investigation usually begins before a particular individual is suspected of the crime. If the rights given to an individual in *Miranda* do not apply in a criminal tax investigation until the government finds evidence that a crime has been committed, it is too late for the principals enunciated in *Miranda* to be effective, because once the evidence shows that a crime has been committed, it also establishes the guilt of the suspected taxpayer. In other words, in a general criminal investigation the police normally conduct a preliminary investigation before finding a suspect, whereas in a criminal tax investigation, when the investigation begins by the assignment of the

case to a Special Agent, there is, and remains, only one suspect.

Although the government argues that *Miranda* is limited to individuals in custody, the decision itself is not so limited. The Supreme Court indicated that an investigation is focused on an accused "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 16 L.Ed. 694 at 706.[1] The *Miranda* decision did not limit the right to counsel to a person in custody as the Court recognized that an individual could convict himself by waiving his constitutional rights before the "in custody" status had been reached.

Fully consistent with *Miranda,* the Supreme Court in *Escobedo v. Illinois,* 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed. 2d 977 (1964), made its position clear that the police should obtain independent evidence against an individual and not rely upon his convicting himself:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:
>
> '[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incom-

1. See *Kamisar,* "A Dissent From the Miranda Dissents", 65 Mich. Law Review 59, 66 (1966): "Moreover, I think it plain that the last stand will not be made in the stationhouse. By defining 'custodial questioning' to mean 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way,' the *Miranda* Court seemed to anticipate still other battlefields—the squad car, the streets, public places, and even homes."

plete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. . . Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' 8 Wigmore, Evidence (3rd ed. 1940), 309. (Emphasis in original.). . .

"We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." 378 U.S. 478 at pp. 488-490.

II. Taxpayer Has the Right Under Arizona Law to Prevent the Government from Examining and Photocopying the Work Papers of His Accountant.

Although Sidney Markow, taxpayer's accountant, voluntarily let the Special Agent examine his work papers, these work papers are protected from disclosure by the Arizona Accountant's Privilege.[2] As a result, Mr. Markow had no legal right under State law to divulge these documents without the express permission of Mr. Selinger.

2. "Certified public accountants and public accountants practicing in this state shall not be required to divulge, nor shall they voluntarily divulge information which they have received by reason of the confidential nature of their employment. Information derived from or as a result of such professional source shall be deemed confidential, but this section shall not be construed as modifying, changing or affecting the criminal or bankruptcy laws of this state or the United States." A.R.S. § 32-749.

In this area of the law, the Ninth Circuit, in *Baird v. Koerner,* 279 F.2d 623 (9th Cir. 1960), held that Federal Courts would follow the law of the forum state in determining the rules of privilege where there is no Federal statute establishing such privilege. Since there is no federally created accountant's privilege, the District Court sitting in Arizona is obligated to apply the Arizona Accountant's Privilege. See *United States v. Ladner,* 238 F.Supp. 895 (S.D. Miss. 1965).

The two cases cited by the government in its brief, *Deck v. United States,* 339 F.2d 739 (D.C. Cir. 1964) and *In re Fahey,* 300 F.2d 383 (6th Cir. 1961) are not applicable because neither of those cases discussed a state-created accountant's privilege.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order denying appellants' motion for the return of property and suppression of evidence be reversed, and the cause remanded with instructions to enter an order to return property and suppress evidence.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

David R. Frazer